Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Reffat K. Abofreka, M.D.
Medical License Number 11259,

Petitioner,

v.

South Carolina Board of Medical Examiners,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Henry Hammer
Hammer & Hammer
1634 Main Street
Columbia, SC 29201
(803) 799-8600

W. Allen Nickles, III
Gergel, Burnette, Nickles,
Grant & Leclair
1400 Main Street, Suite 700
Post Office Box 1866
Columbia, SC 29202
(803) 779-8080

ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a licensed physician in an administrative disciplinary proceeding is denied "liberty" and "property" rights to practice his chosen profession free from unreasonable state interference in violation of the due process clause of the Fourteenth Amendment where he is penalized on the basis of proscribed conduct which had not been charged and of which he had no notice and therefore no opportunity to defend?

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The Petitioner prays that a writ of certiorari issue to review the decision of the South Carolina Supreme Court, dated March 23, 1995, denying the grant of a Petition for a Writ of Certiorari to the South Carolina Court of Appeals and the final judgment entered therein.

OPINIONS BELOW

Certified Report of the Disciplinary Panel of the State Board of Medical Examiners of South Carolina (App. 5) is not reported.

Final Order of the State Board of Medical Examiners of South Carolina (App. 18) is not reported.

Petition for Emergency Review of Final Order of State Medical Board on the ground, inter alia, that Petitioner was denied due process (App. 36) is not reported.

Opinion of Circuit Court (App. 51)

Opinion of South Carolina Court of Appeals (App. 68) is not reported.

Petition for rehearing of decision of South Carolina Court of Appeals on the ground, inter alia, that petitioner was denied due process (App. 72) is not reported.

Order of South Carolina Court of Appeals denying petition for rehearing (App. 77) is not reported.

Petition to South Carolina Supreme Court for issuance of Writ of Certiorari to Court of Appeals (App. 79) is not reported.

Order of South Carolina Supreme Court denying petition for Writ of Certiorari (App. 109) is not reported.

JURISDICTION

The final judgment of the South Carolina Supreme Court was filed on March 23, 1995 (App. 109). Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution Amendment XIV

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Carolina Code § 40-47-200(7),(8),(12):

"Misconduct" which constitutes grounds for revocation or other restriction of a license or limitation on or other discipline of a licensee is a satisfactory showing to the board of any of the following:

> (7) That the holder of a license has violated the principles of ethics as adopted by the State Board of Medical Examiners and published in its regulations.
>
> (8) That the holder of a license is guilty of engaging in any dishonorable, unethical, or unprofessional conduct that is likely to deceive, defraud, or harm the public.
>
> . . .
>
> (12) That the holder of a license is guilty of violating the code of medical ethics adopted by the board in accordance with § 40-47-20 or has been found by the board to lack the ethical or professional competence to practice medicine or osteopathy.

South Carolina Regulation Number 81-60(A),(E)

(A) The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.

. . .

(E) A physician may choose whom he will serve. In an emergency, however, he should render service to the best of his ability. Having undertaken the care of a patient, he may not neglect him; and unless he has been discharged he may discontinue his services only after giving adequate notice. He should not solicit patients.

STATEMENT OF CASE

Petitioner is an Egyptian national who practiced for thirteen (13) years as a physician in the communities of Cheraw and Bennettsville, South Carolina. Petitioner held hospital privileges at Cheraw General Hospital.

On Friday, July 27, 1990, Petitioner was notified that his mother living in Egypt was seriously ill and needed his immediate presence. Pursuant to such notification, Petitioner was able to obtain air transportation to Egypt on Sunday, July 29, 1990. On the date of his departure, Petitioner requested that his secretary contact the hospital administrator on the following day. None of Petitioner's patients were hospitalized or in need of immediate medical attention at the time of his departure.

As a result of his sudden departure, the South Carolina Board of Medical Examiners ("State Board") filed a Complaint against Petitioner charging him with specific particularity, proscribed conduct, to wit: "that on July 30, 1990 Respondent discontinued his services to his patients without first giving them adequate notice of his intention to do so."

Petitioner was tried before the disciplinary panel of the State Board on the charge specified, which was defended on the basis of a sudden emergency without any intention to permanently discontinue his medical services. The disciplinary panel, nevertheless, found Petitioner guilty of the proscribed conduct charged with specific particularity and recommended punishment of a fine of Five Thousand ($5,000.00) Dollars, two (2) years probation and a public reprimand.

The State Board, without receiving further testimony or evidence, found Petitioner guilty of additional conduct of "abandonment of patients" and "professional ineptitude." Pursuant thereto the Board changed the punishment of a Five Thousand ($5,000.00) Dollar fine to Ten Thousand ($10,000.00) Dollar fine, of two (2) years probation to one (1) year suspension followed by indefinite probation. As an additional penalty, to protect "society from professional ineptitude," the Board required as a condition of reinstatement that Petitioner pass an exam testing his medical skills, a penalty totally unrelated to the specific charge on which Petitioner was tried and found guilty by the disciplinary panel.

On appeal to the South Carolina Court of Appeals on the ground that Petitioner's

due process rights were violated the decision of the State Board was affirmed and application to the South Carolina Supreme Court for the issuance of a Writ of Certiorari to the South Carolina Court of Appeals was denied.

REASONS FOR GRANTING WRIT

1. The decision herein is not in accord with the applicable decision of this Court: The decision of the Court below is in direct conflict with the holding by this Court in Cole v. Arkansas, 333 U.S. 196 (1948) in that it is a denial of due process of law in violation of the Fourteenth Amendment to find a person guilty of and penalize such person for proscribed conduct which has not been charged nor notice of which has been given.

2. The action of the Court below constitutes a deprivation of "liberty" and "property" rights guaranteed by the Fourteenth Amendment to the United States Constitution: The decision of the Court below, in finding Petitioner guilty of and enforcing punishment

> for proscribed conduct of which he has not been charged nor afforded notice deprived him of his "liberty" and "property" rights to follow his chosen profession free from unreasonable state interference. This case is of nationwide importance as it affects the rights of all persons engaged in the professions which are regulated by the States.

In its undue interference with basic constitutional rights, the decision below is in conflict with numerous decisions of this Court upholding the rights of individuals engaged in following their chosen professions to a fair trial. See, In re Griffiths 413 U.S. 717, 720 (1973), citing Truax v. Raich, 238 U.S. 33, 41 (1915). That persons have a constitutionally protected right to follow their chosen professions free from unreasonable governmental interference has long been an established principle of jurisprudence, and the deprivation of this fundamental right

has many times been made the basis for this Court granting relief in civil as well as criminal proceedings. See, generally, Greene v. McElroy, 360 U.S. 472, 492 (1959); United States v. Robel, 389 U.S. 258 (1967).

In this case, Petitioner was charged, tried and found guilty by the disciplinary panel of proscribed conduct charged with specific particularity in the only complaint ever served upon the Petitioner. Based upon this charge, the panel entered and recommended appropriate punishment. Thereafter, without issuing additional charges or receiving further evidence, the South Carolina Board of Medical Examiners found Petitioner guilty of two other separate and different alleged violations, to wit: "abandonment of patients" and "professional ineptitude." Based upon these grounds, for which Petitioner received

no notice and no opportunity to defend, the State Board imposed different, additional penalties by raising Petitioner's fine from Five Thousand ($5,000.00) Dollars to Ten Thousand ($10,000.00) Dollars; increasing his probation and public remand to one year suspension followed by indefinite probation, and adding as a condition of reinstatement the penalty of passing an examination totally unrelated to the charge specified with particularity in the complaint upon which Petitioner was tried and punishment recommended by the disciplinary panel. The additional examination sanction imposed by the State Board is also inconsistent with the conclusion stated by the chairman of the disciplinary panel after presentation of the State's witnesses against Petitioner that the panel had heard "no criticism of your

medical competence at this hearing." (See App. 4.)

In apparent recognition of the absence of evidence presented to the disciplinary panel demonstrating intentional misconduct on the part of Petitioner, the final order issued by the State Board reveals that the circumstances giving rise to the interruption of his medical practice were "immaterial" to its determination and that the Board was not interested in the "reason" for this interruption (App. 25). If a finding of "abandonment" is allowed to stand on this evidence, even a physician disabled by illness, accident or emergency must be deemed to abandon his patients and be subject to discipline up to suspension or revocation of license. Such a finding is clearly outside the notice provided to the Petitioner and establishes an independent

basis for reversal of the sanctions imposed by the South Carolina Board of Medical Examiners.

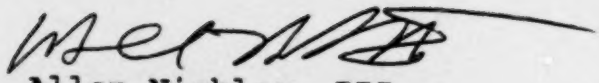
Under the foregoing facts, it is clear that Petitioner was denied due process. This Court so held in a case particularly similar to the instant case, Cole v. Arkansas, 333 U.S. 196 (1948).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Henry Hammer
Hammer & Hammer
1634 Main Street
Columbia, SC 29201
(803) 799-8600



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Gergel, Burnette, Nickles,
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1400 Main Street, Suite 700
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